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6 UNITED STATES DISTRICT COURT
7 WESTERN DISTRICT OF WASHINGTON
8 AT SEATTLE

9 MICHAEL THOMAS,

10 Plaintiff,

11 v.

12 FLAGSTAR BANK, NA, and GREEN TREE
13 SERVICING LLC,

14 Defendants.
15

Case No. C15-1309RSL

ORDER DENYING MOTION
FOR SUMMARY
JUDGMENT

16 This matter comes before the Court on “Green Tree Servicing LLC’s Motions for
17 Summary Judgment.” Dkt. # 38. The Court has considered the parties’ filings, memoranda, and
18 exhibits. For the following reasons, the motion is DENIED.

19 **I. BACKGROUND**

20 This lawsuit stems from a mortgage dispute between Michael Thomas and his loan
21 servicer, Green Tree Servicing LLC (hereinafter “Green Tree”). Green Tree took over servicing
22 Thomas’s home loan in January 2014. The Federal Home Loan Mortgage Corporation (“Freddie
23 Mac”) owned the loan, and Green Tree was its servicer. Servicers collect fees and other income
24 for handling a loan’s day-to-day account-maintenance activities like tracking balances and
25 collecting payments. Servicers also handle defaulted loans and prosecute foreclosures. When
26 Green Tree took over the loan, Mr. Thomas was in foreclosure mediation with his previous
27 servicer. Mediation continued with Green Tree, and while it was underway the parties sought to
28 modify the loan under the federal Home Affordable Modification Program (“HAMP”).

1 HAMP is a program that the Secretary of the Treasury introduced in 2009 to encourage
2 loan modifications for struggling homeowners and allow them to avoid foreclosure. HAMP's
3 modification process proceeds in several steps. See Corvello v. Wells Fargo Bank, NA, 728 F.3d
4 878, 880 (9th Cir. 2013), as amended (Sep. 23, 2013). First, struggling borrowers submit loan
5 and financial information to determine their eligibility. Once the servicer determines that a
6 homeowner is eligible, it offers them a Trial Period Plan ("TPP") agreement. The TPP
7 agreement allows the homeowner to make reduced or modified payments while the parties work
8 toward a permanent modification. To do so, the homeowner and servicer must verify that the
9 homeowner satisfies the conditions for a permanently modified loan. For Freddie Mac loans,
10 one of those conditions is ensuring the mortgage will retain first lien priority compared to any
11 other liens against the property. 2 Freddie Mac, Single-Family Seller/Servicer Guide
12 § B65.20(1)(b) (Jun. 24, 2014).¹ If the borrower satisfies all the relevant conditions, including
13 making the trial payments, the parties execute a permanently modified loan.

14 On August 6, 2014, Green Tree extended Mr. Thomas an offer to enter into a TPP
15 agreement. The offer included the following language:

16 You must contact us . . . to indicate your intent to accept this offer no later than
17 **August 20, 2014**. If you contact us by **August 20, 2014** to indicate your intent to
18 accept this offer, we will not refer your account to foreclosure or if your account has
19 been referred to foreclosure, we will suspend the next legal action in the foreclosure
proceedings.

20 However, if you do not respond by **August 20, 2014**, foreclosure proceedings may
21 continue, and a foreclosure sale may occur, even if such sale is scheduled prior to
22 the first payment due date set forth below. If a foreclosure sale occurs prior to your
making your first payment and you failed to respond by **August 20, 2014**, this offer
has been revoked.

23 **TIME IS OF THE ESSENCE.**

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25
26 ¹ Freddie Mac's Single-Family Seller/Servicer Guide is regularly updated with agency bulletins, letters,
27 and other revisions. The most updated version and other associated information is available at
28 <http://www.freddie.mac.com/singlefamily/guide>. The version in effect at the time of Green Tree's TPP
letter is available at <http://www.freddie.mac.com/singlefamily/guide/bulletins/pdf/062414Guide.pdf>.

1 Dkt. # 39-2. (bold in original). Under the heading “**To Accept This Offer,**” the letter stated Mr.
2 Thomas should notify Green Tree of his intent to accept the offer and he should make his first
3 TPP payment by September 1, 2014. Id.

4 Mr. Thomas timely notified Green Tree that he intended to accept the offer and he started
5 making payments, thus beginning the process of moving toward a permanently modified loan.
6 The final foreclosure mediation was scheduled for January 21, 2015. The parties do not dispute
7 that Mr. Thomas properly made, and Green Tree accepted, three TPP payments and two
8 additional monthly payments before the final mediation session.

9 On January 16, 2015, Green Tree received a report from First American Title showing
10 three federal tax liens recorded against Mr. Thomas’s home between 2009 and 2013. Those
11 three liens were in the amounts of \$6,155.01 (recorded January 6, 2009), \$594.51 (recorded
12 February 6, 2009), and \$98,666.70 (recorded May 3, 2013). Green Tree had previously received
13 reports with title information about the property. When the previous servicer transferred Mr.
14 Thomas’s loan to Green Tree, the transfer included a March 2013 title report that included
15 information about the two 2009 liens. Dkt. # 42 at 17. A title report ordered sometime in
16 October 2014 showed those two liens as well. Dkt. # 42 at 32.²

17 At the final mediation session on January 21, Green Tree informed Mr. Thomas of the
18 liens, and informed him that he was not eligible for a modification because the liens prevented
19 Green Tree from obtaining title insurance. Dkt. # 38 at 8. Two days later, Green Tree notified
20 Mr. Thomas that he was not eligible for a HAMP modification (or for any other modification)
21 because “[Mr. Thomas’s] account did not meet one or more of the basic eligibility criteria of the
22 program.” Dkt. # 39-4.

24 ² In its reply, Green Tree objects to and moves to strike the October 2014 title report and other
25 information that Green Tree produced to Mr. Thomas during discovery, arguing that the documents are
26 hearsay and that they have not been authenticated. Dkt. # 48 at 8. The information in the reports appears
27 in materials Green Tree itself cites, so any truth for which the documents may be offered does not
28 appear to be in dispute. If Green Tree credibly believes that the October 2014 title report is not what it
purports to be, Green Tree is welcome to move for its exclusion in a separate motion. For the purposes
of this motion, however, Green Tree’s request is denied.

1 The parties dispute several items in the facts leading up to that denial. Importantly, the
2 parties do not agree on when, or the extent to which, Green Tree knew of the property's title
3 issues. They also disagree on when Green Tree notified Mr. Thomas of those issues.³

4 Mr. Thomas filed a complaint in King County Superior Court seeking to forestall the
5 impending foreclosure on his home and seeking various forms of damages. Dkt. # 4. The
6 complaint alleges claims for breach of contract, violation of Washington's Consumer Protection
7 Act ("CPA"), RCW 19.86.20, and negligent misrepresentation. Id.

8 Green Tree removed the matter to federal court. Dkt. # 1. After discovery, Green Tree
9 moved for summary judgment on all of Mr. Thomas's claims. Dkt. # 38.

10 II. DISCUSSION

11 Summary judgment is appropriate when, viewing the facts in the light most favorable to
12 the nonmoving party, there is no genuine issue of material fact and the moving party is entitled
13 to judgment as a matter of law. Fed. R. Civ. P. 56(a). The party seeking summary judgment
14 "bears the initial responsibility of informing the district court of the basis for its motion,"
15 Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1986), and "citing to particular parts of materials in
16 the record" that show the absence of a genuine issue of material fact, Fed. R. Civ. P. 56(c). Once
17 the moving party has satisfied its burden, it is entitled to summary judgment if the nonmoving
18 party fails to designate "specific facts showing that there is a genuine issue for trial." Celotex,
19 477 U.S. at 324. The Court will "view the evidence in the light most favorable to the nonmoving
20 party . . . and draw all reasonable inferences in that party's favor." Krechman v. Cty. of
21 Riverside, 723 F.3d 1104, 1109 (9th Cir. 2013).

22 As a preliminary matter, Green Tree emphasizes that Mr. Thomas's response includes
23 facts and theories not explicitly articulated in his complaint. Green Tree argues that Mr. Thomas
24

25 ³ To this point, Mr. Thomas requests that the Court strike certain portions of the declaration submitted
26 by Christy Christensen, Dkt. # 39, because she lacks personal knowledge of the declaration's subject
27 matter. Green Tree does not oppose that request regarding at least one sentence, see Dkt. # 45 at 8, and
28 the Court accordingly strikes that sentence from the record. To the extent Mr. Thomas seeks to strike
additional portions of Ms. Christensen's declaration, those portions did not impact the Court's ruling and
the Court declines that request.

1 must have amended his complaint for the Court to consider these facts and theories at this stage.
2 “Notice pleading requires the plaintiff to set forth in his complaint *claims for relief*, not causes
3 of action, statutes or legal theories.” Alvarez v. Hill, 518 F.3d 1152, 1157 (9th Cir. 2008)
4 (emphasis in original). A complaint need only put a defendant on notice of the claims the
5 defendant will face. The complaint does not limit the facts or legal theories plaintiff can later
6 rely on to prove those claims. For that reason, the Court rejects defendant’s suggestion that the
7 Court ignore facts or theories not included in the complaint.

8 **A. Breach of Contract**

9 Green Tree moves for summary judgment on Mr. Thomas’s contract claim. Formation of
10 a valid contract requires offer, acceptance, and consideration. See Yakima Cty. Fire Prot. Dist.
11 No. 12 (West Valley) v. Yakima, 122 Wn.2d 371, 389–90 (1993). A breach is actionable if “the
12 contract imposes a duty, the duty is breached, and the breach proximately causes damage to the
13 claimant.” Nw. Indep. Forest Mfrs. v. Dep’t of Labor & Indus., 78 Wn. App. 707, 712 (1995).

14 In addition to parties’ express duties under the terms of a contract, “[t]here is in every
15 contract an implied duty of good faith and fair dealing.” Badgett v. Sec. State Bank, 116 Wn.2d
16 563, 569 (1991). “This duty obligates the parties to cooperate with each other so that each may
17 obtain the full benefit of performance.” Id. “Good faith performance of a contract requires being
18 faithful to the agreed common purpose of the contract and performing consistently with the
19 justified expectations of the other parties.” Microsoft Corp. v. Motorola, Inc., 963 F. Supp. 2d
20 1176, 1184 (W.D. Wash. 2013). The duty’s precise scope varies depending on the agreement’s
21 context, but examples of breach include “(1) evad[ing] the spirit of a bargain; (2) willfully
22 render[ing] imperfect performance; (3) interfer[ing] with or fail[ing] to cooperate in the other
23 party’s performance; (4) abus[ing] discretion granted under the contract; or (5) perform[ing] the
24 contract without diligence.” Id.

25 Here, the Court finds Mr. Thomas has sufficiently raised a genuine issue of material fact
26 as to whether Green Tree proceeded in good faith. The TPP letter was an offer. Green Tree
27 explicitly held it out as an offer, and it expressly invokes terms of contractual significance like
28 “offer,” “acceptance,” “revoke,” and “time is of the essence.” The letter provides for the means

1 of acceptance, which Mr. Thomas fulfilled by timely manifesting an intent to accept the offer
2 and by making payments.

3 Mr. Thomas's payments and manifestation of acceptance created a contractual agreement
4 between him and Green Tree. Green Tree would not be actually obligated to permanently
5 modify Mr. Thomas's loan unless he satisfied all the TPP requirements and made all the trial
6 payments, see Corvello, 728 F.3d at 883, but once Mr. Thomas accepted and began making
7 payments, Green Tree was nonetheless subject to a duty of good faith and fair dealing.

8 Green Tree asserts that the title issues prevented a modification of Mr. Thomas's loan,
9 and that it properly denied his modification based on the Freddie Mac guidelines. Dkt. # 38 at 7–
10 9. That assertion does not preclude Mr. Thomas from moving forward with his claim. Evidence
11 in the record supports an inference that Green Tree knew of title issues with the property when it
12 took over the loan in January 2014 and was again alerted to title issues based on the October
13 2014 title report. Green Tree nonetheless undertook the TPP process, collected fees from Mr.
14 Thomas's payments, and then summarily refused him any kind of modification. Those facts
15 support an inference that Green Tree did not proceed in good faith—for example, by
16 undertaking the process with no intent of actually modifying the loan, by waiting until the
17 eleventh hour to alert Mr. Thomas to a fatal flaw in his application, or by failing to afford Mr.
18 Thomas an opportunity to address the title issues before summarily denying his application. See
19 Microsoft Corp., 963 F. Supp. 2d at 1184. Mr. Thomas has accordingly raised a genuine issue of
20 material fact regarding whether Green Tree breached its duty of good faith and fair dealing
21 sufficient to avoid summary judgment on his breach-of-contract claim.

22 **B. Washington Consumer Protection Act**

23 Green Tree moves for summary judgment on Mr. Thomas's CPA claim, arguing that Mr.
24 Thomas cannot show an unfair or deceptive act, that he cannot show an impact on the public
25 interest, and that he cannot show Green Tree caused the alleged harm. Dkt. # 38 at 13.

26 The elements of a Consumer Protection Act claim are (1) an unfair or deceptive act or
27 practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a
28 person's business or property, and (5) causation. Panag v. Farmers Ins. Co. of Wash., 166

1 Wn.2d 27, 37 (2009). As noted, at issue here are the elements of an unfair or deceptive act, an
2 impact on the public interest, and causation. Dkt. # 38 at 13.

3 To be unfair or deceptive, an act or practice need only have the capacity to deceive and
4 the defendant need not have intended it to do so. Deegan v. Windermere Real Estate/Ctr.-Isle,
5 Inc., 197 Wn. App. 875, 885 (2017). “[K]nowing failure to reveal something of material
6 importance is ‘deceptive’ within the CPA.” Indoor Billboard/Washington, Inc. v. Integra
7 Telecom of Wash., Inc., 162 Wn.2d 59, 75 (2007) (marks and citation omitted). “Deception
8 exists if there is a representation, omission or practice that is likely to mislead a reasonable
9 consumer.” Panag, 166 Wn.2d at 50 (marks and citation omitted). Here, the record supports an
10 inference that Green Tree undertook the TPP process with no intention of modifying Mr.
11 Thomas’s loan, or that Green Tree accepted Mr. Thomas’s payments while failing to disclose a
12 fatal flaw in his application. Even if Green Tree did not intentionally deceive Mr. Thomas, the
13 record supports an inference that Green Tree’s conduct would mislead an average loan
14 customer, see Panag, 166 Wn.2d at 50, or that Green Tree knowingly failed to reveal an item
15 (that is, the title issues) of material importance, see Indoor Billboard, 162 Wn.2d at 75.

16 Regarding the act’s impact on the public interest, an allegedly unfair or deceptive act
17 affects the public interest if it is likely that other parties have been or will be injured in the same
18 fashion. Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604–05 (2009). The relevant factors in
19 that determination—none of which is required or dispositive—include whether the alleged acts
20 occurred in the defendant’s course of business, whether the defendant advertised to the public in
21 general, whether the defendant actively solicited the plaintiff, and whether the plaintiff and
22 defendant have unequal bargaining positions. Id. Here, the allegedly deceptive and unfair acts
23 occurred in the course of Green Tree’s business and the TPP offer, subsequent correspondences,
24 and summary denial all came in form letters that do not appear particularized to Mr. Thomas. In
25 addition, Green Tree was in a superior informational position in that the standards for
26 modification, including the Freddie Mac guidelines, are likely to be unknown to the borrowers
27 whose loans Green Tree services. Mr. Thomas has shown an impact on the public interest
28 sufficient to withstand summary judgment.

1 Regarding causation, a plaintiff may establish the CPA’s causation element if “but for the
2 defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.”
3 Schnall v. AT&T Wireless Servs., Inc., 171 Wn.2d 260, 278 (2011). The record supports an
4 inference that but for Green Tree’s allegedly deceptive acts, Mr. Thomas would not have
5 expended time, money, and other resources in furtherance of the modification. See id. For all
6 these reasons, Mr. Thomas has raised a genuine issue of material fact sufficient to avoid
7 summary judgment on his CPA claim.

8 **C. Negligent Misrepresentation Claim**

9 Green Tree moves for summary judgment on Mr. Thomas’s claim of negligent
10 misrepresentation, arguing it owed Mr. Thomas no duty outside of their contractual relationship
11 and that Mr. Thomas cannot show Green Tree made a misrepresentation.

12 The tort of negligent misrepresentation requires showing that a defendant negligently
13 supplied false information in the course of business, and that plaintiff reasonably and
14 detrimentally relied on the false information. Merriman v. Am. Guarantee & Liab. Ins. Co., 198
15 Wash. App. 594, 613 (2017).

16 An important limitation on the availability of a negligent misrepresentation claim is the
17 independent duty doctrine, which provides that a contractual relationship may only give rise to
18 tort claims so long as the defendant breached a duty arising independently of the terms of the
19 contract. Donatelli v. D.R. Strong Consulting Eng’rs, Inc., 179 Wn.2d 84, 92 (2013). A duty to
20 avoid negligent misrepresentation may arise independently of a contract if a defendant’s
21 misrepresentation induces the plaintiff to enter into the contract in the first place. Id. at 95. A
22 party may also have a duty to disclose material facts peculiarly within that party’s superior or
23 specialized knowledge. Van Dinter v. Orr, 157 Wn.2d 329, 334 (2006); Colonial Imports, Inc. v.
24 Carlton Nw., Inc., 121 Wn.2d 726, 732 (1993).

25 The Court rejects Green Tree’s argument that Mr. Thomas cannot prove it made a
26 misrepresentation. For purposes of a negligent misrepresentation claim, a misrepresentation may
27 consist of explicitly false information or accurate information that is misleading, see Dewar v.
28 Smith, 185 Wn. App. 544, 562 (2015), including representations about defendant’s intentions

1 and future conduct, see Flower v. T.R.A. Indus., Inc., 127 Wn. App. 13, 32 (2005). Mr.
2 Thomas's claim rests on Green Tree's representation to Mr. Thomas that he was eligible for a
3 modification even though Green Tree knew or should have known that then-existing title issues
4 would preclude a modification. Evidence in the record raises a genuine issue of material fact as
5 to whether that was the case.

6 The Court also finds that Green Tree owed Mr. Thomas a duty not to commit negligent
7 misrepresentation independent of the contractual duties that flowed from the TPP agreement.
8 The misrepresentation that Mr. Thomas alleges—that is, that nothing disqualified him from
9 eventually obtaining a modification—was one assumption that induced him to enter into the
10 TPP agreement and to make payments that in turn supplied Green Tree fees. In addition, Green
11 Tree had specialized knowledge of the criteria for downstream eligibility and of Mr. Thomas's
12 title status. Green Tree owed Mr. Thomas a duty not to commit negligent misrepresentation that
13 arose independently from the TPP agreement.

14 **D. Damages**

15 Green Tree moves for summary judgment regarding several forms of damages that Mr.
16 Thomas seeks. Specifically, Green Tree moves for summary judgment as to Mr. Thomas's
17 demand for emotional distress damages in his breach-of-contract claim. With certain limited
18 exceptions, damages for mental or emotional distress are not recoverable in contract. Repin v.
19 State, 198 Wn. App. 243, 256 (2017). The limited exceptions are cases where breach carries
20 with it a particularly likely risk of severe emotional disturbance. Id. (citing Restatement
21 (Second) of Contracts § 353 cmt. a). Mr. Thomas asserts that his case falls in that category given
22 the emotional distress that proceeds from a foreclosure and the prospect of losing one's home.
23 Mr. Thomas cites no authority for that proposition, but even if foreclosure falls in that category
24 generally, Mr. Thomas had already faced the prospect of losing his home for quite some time.
25 Nothing in the record suggests the additional marginal distress that Green Tree's alleged breach
26 may have caused him rose to the level of particularly likely and severe distress. See id.


1 Green Tree also moves for summary judgment to the extent Mr. Thomas seeks emotional
2 distress damages for his CPA claim. The Court does not read the complaint as seeking
3 emotional distress damages for the CPA claim, nor does Mr. Thomas's response indicate that.

4 Finally, Green Tree challenges Mr. Thomas's demand for the costs associated with filing
5 this lawsuit as a measure of damages flowing from Green Tree's alleged breach of contract. The
6 parties agree that costs of suit are not recoverable as damages for breach of contract, but that Mr.
7 Thomas may be entitled to costs pursuant to RCW 4.84.010. Dkt. # 38 at 12; Dkt. # 41 at 14.

8 **III. CONCLUSION**

9 For the foregoing reasons, Green Tree's motion for summary judgment, Dkt. # 38, is
10 DENIED. Emotional distress damages are not available for Mr. Thomas's claim of breach of
11 contract.

12 DATED this 26th day of March, 2018.

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15 Robert S. Lasnik
16 United States District Judge
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